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IN THE

Supreme Court of the United States

No. 368

October Term, 1947.

FRANK L. KLOEB, United States District Judge for the Northern District of Ohio,

Petitioner,

v.

EUPHIME V. BERESLAVSKY (Plaintiff in Civil Action No. 5107 against Sun Oil Company).

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT OF THE PETITION.

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IN THE

Supreme Court of the United States.

No. .

OCTOBER TERM, 1947.

FRANK L. KLOEB, UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF OHIO,
Petitioner,

v.

EUPHIME V. BERESLAVSKY, (PLAINTIFF IN CIVIL ACTION NO. 5107 AGAINST SUN OIL COMPANY).

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, a District Judge of the District Court of the Northern District of Ohio, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to review the judgment of that Court, on a petition for writ of mandamus, granting such petition and issuing a writ directing your petitioner to vacate an order of petitioner striking plaintiff's demand for trial by jury in a civil action, *Bereslavsky v. Sun Oil Company,* No. 5107.

A certified transcript of such part of the record in said civil action as is material to the review of said judgment is furnished herewith in compliance with Rule 38 of this Court.

Jurisdictional Statement.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, Ch. (28 U. S. C. Sec. 347).

Summary and Short Statement of Matter Involved.

On August 9, 1944, Euphime V. Bereslavsky filed suit against Sun Oil Company in the United States District Court for the Northern District of Ohio, claiming infringement by defendant, Sun Oil Company, of United States Letters Patent 1,713,589 issued May 21, 1929, relating to fuels for internal combustion engines. The original complaint states that the action arises under Section 4921 as amended, United States Code, Title 38, Section 70, and demands injunctive relief and an accounting of profits and damages. On May 23, 1945, defendant, Sun Oil Company, filed its answer denying ownership of said patent by plaintiff, validity thereof, infringement by defendant and denying plaintiff's right to injunction, accounting or assessment of costs or damages.

No demand for jury was made by either party within the time prescribed by Rule 38 of the Federal Rules of Civil Procedure.

The patent in suit expired May 21, 1946. Since no injunctive relief could be granted after the expiration of the patent, there remained in the case only the issues of patent infringement and validity and the recovery of damages.

On August 27, 1946, plaintiff moved the court for leave to amend his complaint by stating that the action arises under Sec. 4919 U. S. Code, Title 35, Sec. 67, and demanded judgment against defendant for the sum of two million, five hundred thousand dollars.

The motion was sustained in an Order allowing the amendment dated September 24, 1946. The amendment was filed October 2, 1946. Plaintiff demanded a trial by jury October 7, 1946.

No answer to the amendment of the complaint has been served or filed. The answer of May 23, 1945, is the last pleading directed to the issues. No new denials are required, as the issue of patent infringement and validity and damages remains the same.

On February 10, 1947, the defendant, Sun Oil Company, moved to vacate plaintiff's jury demand on the ground that under Rule 38 plaintiff had waived his right to a jury trial on the issue of patent infringement and damages and that the discretion of the Court to grant the demand under Rule 39 should not be exercised.

The motion was sustained in an Order, dated February 25, 1947, striking from the files plaintiff's demand for trial by jury and returning the action to the trial calendar.

Plaintiff then filed a petition in the United States Circuit Court of Appeals for the Sixth Circuit for a Writ of Mandamus (pp. 1-10 Rec.) directing your petitioner to vacate the order striking the plaintiff's demand for a jury. No oral argument was allowed, but after briefs filed the petition was granted and a writ issued directing the respondent, your petitioner to vacate the order striking the jury demand. The opinion of the appellate court is printed in the transcript of record, pp. 13-16.

Rule 2 of the Rules of Civil Procedure provides:

> There shall be one form of action to be known as 'civil action' ".

"Rule 38. Jury Trial of Right.

"(a) RIGHT PRESERVED. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a state of the United States shall be preserved to the parties inviolate.

"(b) DEMAND. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not

later than 10 days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party.

"(c) SAME: SPECIFICATION OF ISSUES. In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

"(d) WAIVER. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5 (d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties."

Questions Presented.

Where a civil action is initiated by a single complaint which raises issues (patent infringement and validity, and damages) which, standing alone, are "triable of right by a jury" and which also seeks equitable relief (injunction)

(a) Is the relief sought "exclusively in equity" so that neither party is entitled to a jury trial of any issue under Rule 38 (b), even though duly demanded, or are the parties entitled to a jury trial, if duly demanded, on the common law issues?

(b) If no demand for jury trial is served within ten days after service of the last pleading directed to the issues, can plaintiff later recover the right to a jury trial so waived by amending his complaint striking out the prayer for equitable relief and serving a demand for jury trial within ten days after such amendment?

Reasons Relied on for the Allowance of the Writ.

The reasons for petitioning a review on *writ of certiorari* are the following:

The Circuit Court of Appeals for the Sixth Circuit (*Bereslavsky v. Kloeb*, R. p.) has rendered a decision in conflict with a decision of the Circuit Court of Appeals for the Ninth Circuit (*Bruckman v. Hollzer*, 152 Fed. 2nd 730).

The Circuit Court of Appeals for the Sixth Circuit (*Bereslavsky v. Kloeb, supra*) has rendered a decision in conflict with decisions of District Courts on the same matter which had established a settled practice. *Sterling Products Corp. v. Sterling Drug, Inc.*, 6 Fed. Rules Serv. 38 b. 12, Case 4 (S. D. N. Y.); *Stewart-Warner Corp. v. Staley*, 6 Fed. Rules Serv. 38 b. 12, Case 3 (W. D. Penna.); *Munkacsy v. Warner Bros. Pictures, Inc.*, 6 Fed. Rules Serv. 38 b. 12, Case 2 (E. D. N. Y.); *Mealy v. Fidelity National Bank in New York*, 6 Fed. Rules Serv. 484; *Waldo Theatre Corp. v. Dondis, et al.*, 1 Fed. Rules Decisions 685 (D. Maine, S. D.)

The Circuit Court of Appeals for the Sixth Circuit has decided, in a civil action brought under Section 4921 R. S. (Title 35, Sec. 70 U. S. Code, amended Aug. 1, 1946, Public Law 587—79th Congress) involving an issue triable as of right by a jury and an issue of equitable relief triable only by a court, that the relief sought is "exclusively in equity" and that here is no issue "triable as of right by a jury," which decision petitioner believes conflicts with the Rules of Civil Procedure uniting the general rules for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both, and particularly with Rule 38. If this decision is sound, injustice has been suffered by parties in other civil actions who, on a similar state of facts, have been denied their constitutional right of trial by jury; while in other actions now pending or which may hereafter be brought the same question may have arisen or may arise and the courts having jurisdiction thereof must resolve the question in the face of conflicting decisions. Your petitioner, believing that the decision is contrary to the letter

and spirit of the Rules, submits that the judgment of the Supreme Court is necessary for the guidance of federal courts in administering the Rules, to insure against either the unjust denial of a constitutional right to either a plaintiff or a defendant, or the unjust compulsion of either party to submit to a trial by jury if the right of the other party thereto has been waived.

Wherefore, your petitioner prays that this petition be granted.

FRANK S. BUSSER,
Attorney for Petitioner.

LEROY E. EASTMAN,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Your petitioner, a judge of the District Court of the United States, raises a fundamental question the answer to which is required for the guidance of federal courts in administering the Rules of Federal Proceduce in many cases now pending. In framing these Rules and thus uniting the general rules prescribed for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both, under the authority of the Act of June 19, 1934, Ch. 651, this court has done away with the procedural distinction between law and equity. The specific question raised by this petition is whether, in an action raising an issue triable as of right by a jury but also demanding equitable relief and triable only by a court, either party may demand a trial by jury of the first issue.

Before proceeding with the Argument, the fact of conflict of decisions, as set forth in the "Reasons Relied on for the Allowance of the Writ", should be made clear.

Point I.

The Decisions of the Circuit Court of Appeals, Sixth Circuit, Conflicts with a Prior Decision of the Circuit Court of Appeals for the Ninth Circuit.

The Circuit Court of Appeals for the Ninth Circuit in *Bruckman v. Hollzer*, 152 Fed. 2nd 730, had before it a complaint which demanded damages, an injunction and an accounting of profits. The complaint in the instant case, *Bereslavsky v. Sun Oil Company*, before the change made in its prayer, sought "* * * a preliminary and final injunction against further infringement by defendant and those controlled by defendant, an accounting for profits

and damages, * * *". Plaintiff, in *Bruckman v. Hollzer,* duly demanded a jury trial within ten days of the last pleading (the answer) and the demand was restricted to the issue seeking damages. Defendants' motion to strike the demand was denied and they petitioned the Circuit Court of Appeals, Ninth Circuit, to compel the district judge to strike the jury demand. The Court, in its opinion denying the petition, observed that the plaintiff contended that the Federal Rules of Civil Procedure

> "* * * now give to the party having a claim triable by jury at common law the power to preserve that right when that claim is joined with other equitable claims involving one of the issues of fact in the common law suit" (p. 732).

The Court further said in its opinion (p. 732):

> "If this contention be correct, it is obvious that, since the issue of infringement is common to all three sets of transactions, the right of jury trial on the common law transaction may be preserved only if the court is required to try the common law issue so that judgment on the verdict is entered before the equitable claims are decided. This is the view held by Judge Moscowitz in *Elkins v. Nobel,* 1 F. R. D. 357, 358, and Judge Conger in *Dellefield v. Blockdel Realty Co.,* D. C., 1 F. R. D. 689, 690.
>
> "We agree with these judges that the Federal Rules of Civil Procedure make such a preservation of the demanded right of jury trial and that to that end the trial judge is required to try and determine that issue before the other. The rules introduce the radical change in the federal practice of creating the jurisdiction in the District Courts to hear and determine in a single suit equity claims, with a claim which theretofor could have a common law adjudication in a separate suit."

The petition for the writ was denied.

This decision clearly supports petitioner's position that plaintiff in the present case had the right, based on the original complaint, to demand a jury trial on the issue of damages and clearly conflicts with the holding by the Circuit Court of Appeals for the Sixth Circuit (R. pp. 15-16) that he did not have that right. The only difference between the two cases is that in the cited case plaintiff duly demanded that right, while in the instant case that right was not demanded and the right was waived.

Point II.

The Decision of the Circuit Court of Appeals, Sixth Circuit, Conflicts with Prior Decisions of District Courts.

Sterling Products Corp. v. Sterling Drug, Inc., 6 Fed. Rules Serv. 38 b. 12, Case 4 (S. D. N. Y.):

The original complaint asked for an injunction restraining the defendants from continuing to use the name "Sterling Products, Inc." and for $250,000 damages. Leave to amend by omitting the request for injunction was sought on the ground that injunctive relief was no longer necessary in view of the change of defendant's name.

The court held that it was apparent that the only reason why plaintiff desired to amend the complaint was to enable it to get a jury trial, but that, at so late a date, it could not, through the device of amending the complaint by eliminating the request for injunctive relief, change a non-jury action into a jury action.

In *Stewart-Warner Corp. v. Staley*, 6 Fed. Rules Serv. 38 b. 12, Case 3 (W. D. Penna.) plaintiff filed a bill in equity prior to the effective date of the Federal Rules. The bill charged patent infringement and sought injunctive relief and an accounting for damages and profits. The case therefore automatically fell under Sec. 4921 R. S. After the Federal Rules went into effect plaintiff moved to amend the complaint to eliminate the demand for equitable relief and demanded a jury trial. The Court held that the demand

came too late. The Court also held that if it were to apply Rule 38, the plaintiff's demand is too late, not having made its demand within ten days after the service of the last pleading directed to the issue of patent infringement.

In *Munkacsy v. Warner Bros. Pictures, Inc.*, 6 Fed. Rules Serv. 38 b. 12, Case 2 (E. D. N. Y.) the original compliant contained a cause of action (violation of the Civil Rights Law of the State of New York) which was an issue triable by a jury. A motion was made to amend the complaint by asserting two causes of action, namely, one for libel and the other the same cause of action alleged in the original complaint. The motion was granted. Plaintiff demanded a jury trial. The Court held that by failing to serve the demand for jury trial within ten days after the filing of the answer, the plaintiff waived the right to trial by jury on all issues raised in the original pleading and that the time within which a demand may be served is not extended by the service of amended pleadings unless the amended pleading introduces new issues triable by a jury, in which case demand for trial by jury could be made only on the new issues.

The facts in this case are not precisely parallel to those in two previously cited cases and the instant case, but it announces the principle that demand for a jury trial is a matter of right only if the amended pleading raises a new issue. In the instant case the amended pleading raises no new issue.

Mealy v. Fidelity National Bank in New York, 6 Fed. Rules Serv. 484, is, like the immediately preceding case, one in which the amended complaint re-pleaded the original issue and pleaded also a new issue and in which a demand for a jury trial was granted only on the new issue and refused on the old issue because of failure to demand a jury trial on the original issue.

Waldo Theatre Corp. v. Dondis, et al., 1 Fed. Rules Decisions 685 (D. Maine, S. D.).

In this case the original complaint demanded damages for violation of the anti-trust law and an injunction was asked to restrain continuance of an alleged conspiracy to injure plaintiff. No demand for a jury trial was made after the last pleading. Later the plaintiff filed a supplemental complaint in which it was asserted that the alleged illegal acts of the defendants had continued after the filing of the original complaint, to which Answers were filed. The plaintiff then demanded a jury trial on all the issues raised by the supplemental complaint and the original complaint. The Court held that plaintiff was not entitled to a jury trial on any issue raised in the original complaint.

The opinion is of special interest in that it contains an analysis of Rule 38 that may well serve as a brief for petitioner in the instant case. It expressly holds that a party may waive a jury on some issues and demand a jury trial on others. In that case, as in the instant case, the original complaint asked for an injunction, but the court did not hold that thereby the original complaint was "exclusively in equity", but on the contrary held that a jury trial might have been demanded, under Rule 38, on the issue of conspiracy, but that the action became a court action because, by permitting Rule 38 (d) to operate, the right to a jury trial on this issue was waived.

The Court applied the same ruling to the cases of *Millinocket Theatre, Inc. v. Kurzon, et al.* and *Miller v. Kurzon, et al.*, pending in the Northern Division of the same District.

These decisions, including the decision of the Circuit Court of Appeals for the Ninth Circuit, cannot be reconciled, and are in direct conflict, with the holding of the Circuit Court of Appeals for the Sixth Circuit that the relief sought in the instant case was "exclusively in equity" and that it raised "no issue triable as of right by a jury" and that only when he amended his complaint by abandoning his prayer for "equitable" relief was he, for the first time, in a position to demand a jury trial.

The practice established by the cases above cited may be thus briefly stated:

If, by an amendment, a new issue (triable by jury) is pleaded the defendant can demand a jury trial on that new issue, but he cannot demand a jury trial on an original issue merely by repleading it in an amendment. If there are two issues in the original pleading (one triable by a jury and the other by the court) and if amendment merely eliminates one issue, an amendment that repleads the other issue is not "a last pleading directed to such other issue" in the sense of Rule 38, and if there was no demand for a jury trial within the time provided by Rule 38, the resultant waiver of the right to demand a jury trial is binding and final.

None of the above decisions was considered in the opinion of the Circuit Court of Appeals, although all were cited and in detail discussed in petitioner's brief in opposition to the petition for mandamus.

One of the decisions cited by the Circuit Court of Appeals for the Sixth Circuit that is difficult to reconcile with the above cited cases is *Bellavance v. Plastic Craft Novelty Co., et al.,* 30 Fed. Supp. 37 (D. C. Mass., 1939) in which the plaintiff claimed both injunction and damages and placed the case on the jury calendar. Defendant's motion to strike the action from the jury calendar was granted. The Court said at page 39:

> "The distinction between Law and Equity, abolished by the new rules, is a distinction in procedure and not a distinction between remedies."

The distinction between "procedure" and "remedies" appears to be a distinction without a difference. Rule 38 gives either party a remedy, in a case asking for equitable relief, that he did not theretofore have, namely, the right to the separate trial of any other issue triable of right by a jury.

This decision was one of the earliest, if not the earliest, decision rendered after the Federal Rules went into effect. The only precedent quoted was a decision of the Supreme Court, *Barton v. Barbour,* 104 U. S. 126 (133), decided in 1881, in which it was held (bottom of page 133 and top of page 134) that upon a bill filed for an injunction to restrain the infringement of letters patent it was then "the constant practice of courts of equity to try without a jury issues of fact . . . involving questions of the novelty, utility, prior public use . . . of the invention patented." That, as hereinbefore stated, remained the established procedure for 57 years thereafter, but not—so petitioner contends—after the adoption of the Federal Rules.

The other decision cited by the Court of Appeals (*Williams v. Collier, et al.,* 32 Fed. Supp. 321, D. C., E. D. Penna.), involving equitable issues and an issue which, standing alone would be triable by a jury, followed the decision in the *Bellavance* case, but in that case, as in the *Bellavance* case, the plaintiff apparently demanded a jury trial on all the issues, to which, of course, he was not entitled; and the question considered by the court was whether the whole action was in essence one at law or equity.

These two decisions, taken in connection with those hereinbefore quoted, simply emphasize the confusion and conflict among existing decisions.

Consideration of Opinion of Circuit Court of Appeals, Sixth Circuit.

Attention is directed to that part of the opinion of the Circuit Court of Appeals (R. p. 14) which holds that "the Rules of Civil Procedure . . . have not obliterated for all purposes the historic differences between law and equity" and that "cases that historically were equitable are still to be tried to the court, and those that were legal to the jury."

And to the concluding paragraph of the opinion (R. pp. 15-16), which holds that although the contention that the

amended complaint states no new issue may be true, the original complaint sought only an equitable remedy, the claim for damages being merely incidental and the suit being "exclusively in equity."

Petitioner does not contend that the historic differences between law and equity have been obliterated, since petitioner's position that there are equitable issues triable only by a court and other issues triable of right by a jury necessarily constitutes a recognition of the historic differences between them. And it is not disputed that, before the promulgation of the Rules of Civil Procedure, when both such issues were joined in a single complaint the action was a "suit in equity" triable only by the Court.

Petitioner's position is that, under the Rules of Civil Procedure, and specifically under Rule 38, where both such issues are joined in a single complaint, any issue which, if it stood alone, would be triable of right by a jury is no longer "but incidental" to the prayer for equitable relief. Rule 38 does not provide that any party may demand a trial by jury of any issue triable of right by a jury provided all the issues are so triable. The rule clearly contemplates the joinder in one action of issues that, if standing alone, would be triable of right by a jury and issues that are not so triable. Where two such issues coexist in the same case, the new procedure gives a new remedy, namely, the right to separate trials by court and jury of the respective issues.

The opinion of the Circuit Court of Appeals for the Sixth Circuit is consistent only with the assumption that the Supreme Court contemplates the application of Rule 38 only to cases in which all the issues are triable as of right by a jury, and that the rule is a nullity so far as concerns securing to either party any constitutional right to trial by jury that he did not have under the old procedure.

Under the old procedure, the rights of the parties were unequal. The plaintiff could bring separate actions on two issues, one of which was triable by a jury and the other

by the court. Or he could elect to join the two issues in a single complaint and thus deprive the defendant of the right to a jury trial on the first issue. Under Rule 38, as the Circuit Court of Appeals for the Sixth Circuit applies it, plaintiff still has this advantage. As petitioner interprets the Rule, this inequality of remedies is removed, either party having the right to demand a jury trial on the first issue.

In many cases claiming the two types of relief, it is the common law relief that is primarily sought. So, in the instant case, owing to the short remaining life of the patent, no right to injunctive relief reasonably could be expected before the end of the litigation; and it hardly could be contended that the claim for 2½ million dollars was "but incidental" to the prayer for injunction.

That by the amendment of the complaint the cause of action was shifted from Section 4921 R. S. to Section 4919 R. S. is not significant. The Circuit Court of Appeals for the Sixth Circuit recognized that its decision was applicable to any case in which the original complaint raises an equitable issue and in which the amended complaint involves no new issue. While, under the old practice, an action under Sec. 4921 R. S. was a suit in equity, and an action under Sec. 4919 R. S. was an action at law, under the new practice both are Civil Actions. In both sections the provisions as to recovery of general damages are the same. In Sec. 4919 the damages assessed are damages "found by the verdict as the actual damages sustained." Sec. 4921 provides that "the Court may adjudge and decree the payment by defendant to the complainant of a reasonable sum as general damages for the infringement." Sec. 4921 provides also that the Court shall have the same power to

increase such damages, in its discretion, as is given to increase the damages found by verdicts in actions in the nature of actions of trespass upon the case (Sec. 4919). If the case is tried by the court, its right to issue an injunction and assess damages, or to issue an injunction and refuse damages, or to deny an injunction and award damages, cannot be questioned. The following are examples of cases, the first three of which are actions for patent infringement falling under Sec. 4921 R. S., in which damages were directed or awarded and an injunction denied:

Draper Co. v. American Loom Co., 161 Fed. 728 (732), C. C. A., 1st Circuit;

City of Milwaukee v. Activated Sludge, 69 Fed. (2d) 577 (593), C. C. A., 7th Circuit;

Champion Spark Plug Co. v. Reich, 34 Fed. Supp. 414, D. C., W. D. Mo.;

Champion Spark Plug Co. v. Reich, 121 Fed. (2d) 769 (772), C. C. A., 8th Circuit.

If the decision of the appellate court in the instant case be assumed to be sound, the plaintiffs in the five District Court cases hereinbefore cited were improperly denied their constitutional right of trial by jury on issues of right triable by a jury, while in *Bruckman v. Hollzer* the Circuit Court of Appeals for the Ninth Circuit was in error in denying the petition for the writ of mandamus. We submit that a plaintiff cannot deprive a defendant of his right to trial by jury of issues triable of right by a jury by the simple expedient of adding a claim for equitable relief, nor can a defendant be deprived of its right, under the waiver clause of Rule 38, to have all issues tried by the court.

Conclusion.

For the reasons herein set forth the petition for Writ for Certiorari should be allowed.

Respectfully submitted,

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FRANK L. KLOEB, United States District Judge for the Northern District of Ohio,

Petitioner,

v.

EUPHIME V. BERESLAVSKY, (Plaintiff in Civil Action No. 5107 Against Sun Oil Company).

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Supplemental Statement.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Attention of the Court is directed to the newly discovered decision of the Circuit Court of Appeals, Fifth Circuit, *Keene et al. v. Hale Halsell Co.*, 118 Fed. (2d) 332, 8th syllabus and paragraph (8); which holds that, under Rules of Civil Procedure 38 and 42, in an action involving an equitable issue and an issue triable at common law, the latter may be tried by a jury separately from the equitable issue. This case also is believed to clearly conflict with the decision of the Circuit Court of Appeals, Sixth Circuit, whose judgment that such cases are exclusively in equity and triable only by the court your petitioner prays this court to review.

Respectfully submitted,

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